Su Wee Lip @ Philip Su v Hj Lassim Abdul Rahman

COURT OF APPEAL (KOTA KINABALU) — CIVIL APPEAL NO S-02–447 OF 2007
GOPAL SRI RAM, TENGKU BAHARUDIN SHAH AND SULAIMAN DAUD JJCA
26 FEBRUARY 2008

Civil Procedure — Appeal — Fact, findings of — Appellant's memorandum of appeal not attacking trial judge's findings of facts — Trial judge thoroughly analysing facts and acting on cogent evidence — Whether open to appellant to question trial judge's findings of facts — Whether appellate interference warranted

Contract — Estoppel — Estoppel by conduct — Defendant's acknowledgement and acceptance of terms not to challenge plaintiff's rights under agreement — Whether such conduct would estop defendant from challenging plaintiff's rights

Contract — Terms — Construction of — Whether agreement null and void due to defendant's failure to perform obligations — Whether defendant ought to be allowed to take advantage of own wrong

Some 327 natives executed a power of attorney in favour of PW2 and PW3. The power was to enable PW2 and PW3 to deal with the natives' properties ('the properties') and was sub-delegable to a third party. PW2 and PW3 thereafter executed a substituted an irrevocable power of attorney on 13 July 1999 in the defendant's favour. The defendant did nothing about the properties, prompting PW2 and PW3 to attempt a revocation of the power. On 26 May 2000, PW2 and PW3 placed an advertisement in a newspaper to give the defendant notice. They did not obtain the consent of the defendant to the purported revocation. PW2 and PW3 thereafter entered into an agreement with the respondent ('the plaintiff') for the sale of the properties. The plaintiff, realising the purported revocation was useless, decided to buy out any right the defendant had under the power of attorney donated to him by PW2 and PW3. Consequently, on 10 October 2000, the plaintiff, his partner and the defendant executed a deed ('the October deed') under which terms the defendant received an initial payment and was to, inter alia, deliver the titles to the properties to a stakeholder on or before 31 December 2000. In August 2003, the plaintiff discovered that the titles of the properties had been collected by the defendant's solicitor's clerk. The plaintiff issued a writ and applied for a prohibitory injunction to, inter alia,

prevent the defendant from dealing with the properties or interfering with the plaintiff's enjoyment of the properties. The defendant argued: (i) that he had sold and transferred all the properties to one Madam Thien who was a bona fide purchaser for value; (ii) under the terms of the October deed, in the event the defendant failed to deliver the titles to the properties to the stakeholder by 31 December 2000, the whole deed would become null and void thereby freeing the defendant to deal as he pleased with the properties; (iii) the plaintiff had no right to the properties at the time the October deed was executed since the plaintiff had entered into the agreement with PW2 and PW3 at a time (in 25 August 2000) when the power of attorney in his favour was still extant. The High Court allowed the plaintiff's action and found that the defendant was guilty of fraud. The defendant appealed to the Court of Appeal.

Held, dismissing the appeal with costs:

(1) From an analysis of the October deed, it was clear that the deed did not lapse and become null and void for all purposes when the defendant failed to deliver the titles to the stakeholder by 31 December 2000. The defendant could not also be allowed to take advantage of his own wrong. In the sphere of contract law, a guilty party ought not to be permitted to take advantage of his own breach of the contract. In the instant case, it was the defendant who, by his own omission, sought to bring an end to the October deed with the plaintiff being blameless. To permit the defendant to do that would be to enable him to take advantage of his own wrong (see para 10); *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 followed.

(2) The defendant's argument that he was free to deal with the properties because of the mistaken assumption contained in the October deed was completely devoid of merits. The defendant acknowledged in the October deed that he had no longer any rights under the power of attorney given to him in 1999 by PW2 and PW3. He also acknowledged that he would not challenge the revocation of the power in any circumstances. The promise made by him survived despite his failure to deliver the titles by 31 December 2000. It therefore could not lie in the defendant's mouth to challenge the plaintiff's rights. The acceptance by the defendant that he would not challenge the revocation of the power of attorney in his favour had the effect of putting beyond his challenge the plaintiff's rights, title and interest under the agreement dated 25 August 2000. The defendant's conduct in the instant case raised an estoppel against him in respect of the plaintiff's rights over the properties. In order to attack the plaintiff's rights the defendant had to

show that the revocation of the power of attorney given to him was bad. He could not do that because he had assured or represented to the plaintiff that he would not challenge the revocation (see para 12).

(3) The defendant's complaint that the trial judge had misdirected himself on the facts faced two serious obstacles. Firstly, the defendant's memorandum of appeal was inadequate in that it did not contain any attack on the trial judge's findings of facts. Secondly, in any event, the findings of the trial judge on all material points before him were entirely fact sensitive. The trial judge after a very thorough and careful analysis of the facts came to the conclusion that the defendant had acted fraudulently in all circumstances of the case. He had judicially appreciated and evaluated the evidence before him and was amply warranted in arriving at the decision as he did. There was no doubt that there was cogent evidence on record to support his findings. A reasonable tribunal faced with the evidence and facts that were presented at trial in the instant case would have come to the conclusion that the charges against the defendant had been proven beyond a reasonable doubt. This was a case that did not warrant appellate interference (see paras 13 & 15); *Clarke v Edinburgh Tramways Co* [1919] SC 35 (HL) followed.

[Bahasa Malaysia summary

Lebih kurang 327 penduduk asal telah menyempurnakan surat kuasa wakil atas nama PW2 dan PW3. Kuasa itu adalah untuk membolehkan PW2 dan PW3 menguruskan hartanah-hartanah penduduk asal ('hartanah tersebut') dan boleh menugaskan kerja dan kuasa kepada pihak ketiga. PW2 dan PW3 kemudian telah menyempurnakan surat kuasa wakil pengganti dan tak boleh batal pada 13 Julai 1999 memihak kepada defendan. Defendan tidak berbuat apa-apa kepada hartanah tersebut, menyebabkan PW2 dan PW3 cuba membatalkan kuasa tersebut. Pada 26 Mei 2000, PW2 dan PW3 telah mengiklankan dalam akhbar untuk menyampaikan notis kepada defendan. Mereka tidak memperoleh persetujuan defendan untuk pembatalan yang dikatakan itu. PW2 dan PW3 kemudian telah memasuki perjanjian dengan responden ('plaintif') untuk jualan hartanah tersebut. Plaintif, yang menyedari pembatalan yang dikatakan itu adalah sia-sia, telah memutuskan untuk membeli apa-apa hak defendan ada di bawah surat kuasa wakil yang telah didermakan kepadanya oleh PW2 dan PW3. Berikutan itu, pada 10 Oktober 2000, plaintif, rakan kongsinya dan defendan telah menyempurnakan surat ikatan ('surat ikatan Oktober') di bawah terma yang mana defendan menerima bayaran pendahuluan dan perlu, antara lain, menyerahkan hak milik-hak milik hartanah tersebut kepada pemegang amanah harta pada atau sebelum 31 Disember 2000. Pada bulan Ogos 2003, plaintif mendapati hak milik-hak milik hartanah tersebut telah diambil oleh

kerani peguam defendan. Plaintif telah mengeluarkan writ dan memohon injunksi larangan untuk, antara lain, menghalang defendan daripada menguruskan hartanah tersebut atau campur tangan dengan nikmat yang diperoleh oleh plaintif ke atas hartanah tersebut. Defendan berhujah: (i) bahawa dia telah menjual dan memindah hak semua hartanah tersebut kepada Madam Thien yang merupakan pembeli untuk nilai yang bona fide; di bawah terma-terma surat ikatan Oktober, sekiranya defendan gagal untuk menyerahkan hak milik-hak milik hartanah tersebut kepada pemegang amanah harta pada 31 Disember 2000, seluruh surat ikatan akan menjadi terbatal dan tidak sah dan dengan itu memberikan defendan kebebasan untuk berurusan sesuka hatinya dengan hartanah tersebut; (iii) plaintif tiada hak ke atas hartanah tersebut memandangkan plaintif telah memasuki perjanjian dengan PW2 dan PW3 pada masa (pada 25 Ogos 2000) apabila surat kuasa wakil memihak kepadanya masih wujud. Mahkamah Tinggi telah membenarkan tindakan plaintif dan mendapati defendan bersalah kerana fraud. Defendan telah merayu ke Mahkamah Rayuan.

Diputuskan, menolak rayuan dengan kos:

(1) Berdasarkan analisis surat ikatan Oktober, adalah jelas bahawa surat kuasa wakil itu tidak luput masa dan menjadi terbatal dan tidak sah untuk apapun tujuan apabila defendan gagal menyerahkan hak milik-hak milik kepada pemegang amanah harta pada 31 Disember 2000. Defendan juga tidak boleh dibenarkan mengambil kesempatan ke atas kesalahannya. Dalam bidang undang-undang kontrak, pihak yang bersalah tidak patut dibenarkan mengambil kesempatan terhadap pelanggaran kontraknya sendiri. Dalam kes ini, defendan melalui peninggalannya sendiri telah membawa kepada penamatan surat ikatan Oktober tersebut. Plaintif tidak boleh disalahkan. Untuk membenarkan defendan berbuat sesuatu yang mana membolehkannya mengambil kesempatan ke atas kesalahannya sendiri (lihat perenggan 10); *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 diikut.

(2) Hujah defendan bahawa dia bebas berurusan dengan hartanah tersebut kerana andaian yang tersilap terkandung dalam surat ikatan Oktober itu langsung tidak mempunyai merit. Defendan telah mengakui dalam surat ikatan Oktober itu bahawa dia tidak lagi mempunyai apa-apa hak di bawah surat kuasa wakil yang diberikan kepadanya dalam tahun 1999 oleh PW2 dan PW3. Dia juga mengakui bahawa dia tidak akan mencabar pembatalan kuasa tersebut dalam apa-apa keadaanpun. Janji yang dibuatnya kekal meskipun dia gagal untuk menyerahkan hak milik-hak milik tersebut pada 31 Disember 2000. Oleh itu defendan tidak boleh mengatakan akan mencabar hak-hak plaintif. Penerimaan

oleh defendan bahawa dia tidak akan mencabar pembatalan surat kuasa wakil memihak kepadanya mempunyai kesan meletakkan cabarannya melampaui hak-hak, hak milik dan kepentingan plaintif di bawah perjanjian bertarikh 25 Ogos 2000. Perlakuan defendan dalam kes ini menimbulkan estopel terhadapnya berkaitan hak-hak plaintif ke atas hartanah tersebut. Bagi tujuan membidas hak-hak plaintif defendan perlu menunjukkan bahawa pembatalan surat kuasa wakil kepadanya adalah salah. Dia tidak boleh berbuat sedemikian kerana dia telah meyakinkan atau mengatakan kepada plaintif yang dia tidak akan mencabar pembatalan tersebut (lihat perenggan 12).

(3) Aduan defendan bahawa hakim perbicaraan telah salah arah atas fakta berhadapan dengan dua halangan serius. Pertama, memorandum rayuan defendan tidak mencukupi kerana ia tidak mengandungi apa-apa bidasan atas penemuan fakta hakim perbicaraan. Kedua, dalam apa keadaan, penemuan hakim perbicaraan atas semua perkara-perkara penting di hadapannya adalah keseluruhannya fakta sensitif. Hakim perbicaraan setelah meneliti dan menganalisis fakta-fakta telah tiba kepada kesimpulan bahawa defendan telah bertindak secara fraud dalam semua keadaan kes tersebut. Beliau telah menyedari secara kehakiman dan menilai keterangan di hadapannya dan dengan sewajarnya telah tiba kepada keputusan yang dibuatnya. Tiada keraguan bahawa terdapat keterangan yang meyakinkan atas rekod untuk menyokong penemuannya. Tribunal yang munasabah berhadapan dengan keterangan dan fakta-fakta yang dikemukakan semasa perbicaraan dalam kes ini akan tiba kepada kesimpulan bahawa pertuduhan-pertuduhan terhadap defendan telah dibuktikan melampaui keraguan munasabah. Ini adalah kes yang tidak mewajarkan campur tangan mahkamah rayuan (lihat perenggan 13 & 15); *Clarke v Edinburgh Tramways Co* [1919] SC 35 (HL) diikut.]

Notes

For cases on construction of terms of contract, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5251–5295.

For cases on estoppel by conduct, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3251–3542.

For cases on finding of fact, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 898–1004.

Cases referred to

Clarke v Edinburgh Tramways Co [1919] SC 35 (HL) (folld)

Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302, SC (folld)

Appeal from: Civil Suit No K22–08 of 2004 (High Court, Kota Kinabalu)

Peter Vung Yin Sing (Muhammad Shafee with him) (Junius Yung & Co) for the appellant.

Cyrus Das (Colin Lau and Baldev Singh with him) (Baldev Singh & Associates) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

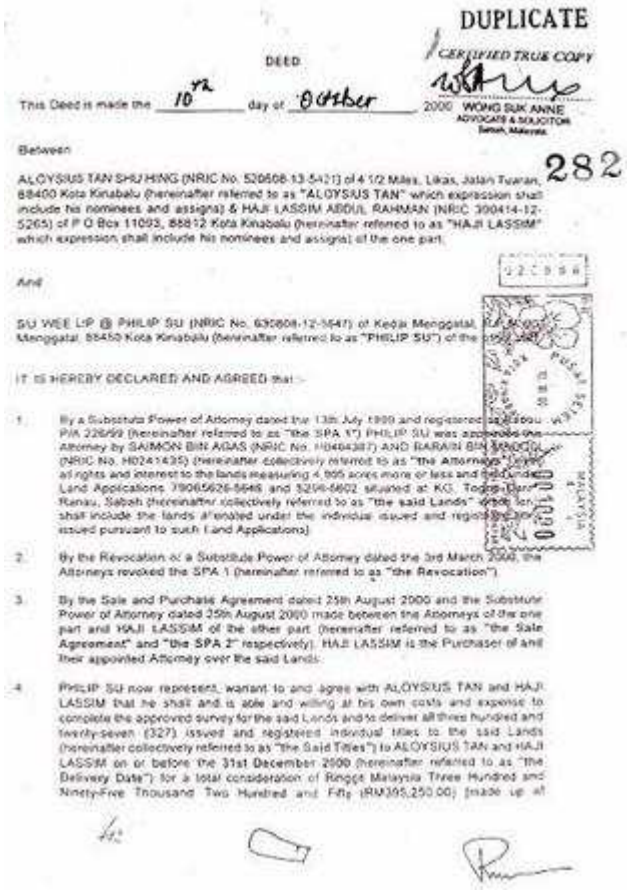
[1] This is the judgment of the court.

[2] The appellant before us (the defendant in the court below) has appealed against the decision of Ian Chin J finding him guilty of fraud. The finding relates to a transaction relating to land about which we will say a few words in a moment. But we must say at once that our task at summarising the facts has been made light by both learned counsel who have argued before us and also the succinct approach by the learned judge in his judgment.

[3] Here are the facts. The dispute in this case is in respect of 327 lots of lands which were originally intended for 327 natives in Kg Togop Darat, Ranau, Sabah. For convenience we will refer to them as 'the subject properties'. What happened was this. The natives in question executed a power of attorney in favour of one Saimon bin Agas ('PW2') and Barain bin Madoli ('PW3'). That power, by its terms, enabled PW2 and PW3 to sub-delegate their powers to a third party. On 13 July 1999 PW2 and PW3 executed a substituted power of attorney in the defendant's favour. It was irrevocable by its terms. The evidence led at trial shows that nothing happened between 13 July 1999 and March 2000. The natives no doubt agitated by the inaction brought pressure to bear on PW2 and PW3. These two persons found themselves in a quandary. They had taken a power from the natives to do something with the lands. They could not do anything about it. Indeed they were in no position to do anything about it. So they had entrusted the matter to the defendant. And he had done nothing about it. In their desperation they tried to make the best that they could of a bad situation. So, they took steps to revoke the power of attorney given to the defendant despite its irrevocability. They had to give notice to the defendant. They did this by placing an advertisement in *Borneo Mail* of 26 May 2000. Then on 25 August 2000 PW2 and PW3 purported to enter into an agreement with the respondent (the plaintiff in the court below) to sell the subject property to him. The purchase price was RM981,000. The plaintiff made part payment. But then he had an impediment to the completion of the transaction. He was faced with an irrevocable deed of power of attorney given by PW2 and PW3 to the defendant. There had been a purported revocation

but it was useless because it was done without the defendant's consent. The plaintiff dealt with the impediment in this way.

[4] He and his joint venture partner, one Aloysius Tan, approached the defendant. The object was to buy out any right the defendant may have under the power of attorney given to him by PW2 and PW3. On 10 October 2000 Aloysius Tan and the plaintiff entered into a deed ('the October deed') with the defendant. It is a document of paramount importance in this case. Indeed the way in which this appeal has been argued for the defendant makes it clear that the whole case before us turn upon this document. The judge reproduced it in his judgment. We will do likewise. This is what it says:



DUPLICATE

CERTIFIED TRUE COPY

WONG SUK ANNE
ADVOCATE & SOLICITOR
Sabah, Malaysia

DEED

This Deed is made the 10th day of October 2000

Between

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ALOYSIUS TAN SHU HING (NRIC No. 520608-13-5421) of 4 1/2 Miles, Likas, Jalan Tuaran, 88400 Kota Kinabalu (hereinafter referred to as "ALOYSIUS TAN" which expression shall include his nominees and assigns) & HAJI LASSIM ABDUL RAHMAN (NRIC 300414-12-5265) of P O Box 11093, 88812 Kota Kinabalu (hereinafter referred to as "HAJI LASSIM" which expression shall include his nominees and assigns) of the one part

And

SU WEE LIP @ PHILIP SU (NRIC No. 630608-12-5647) of Kedai Menggatal, Menggatal, 88450 Kota Kinabalu (hereinafter referred to as "PHILIP SU") of the other part

IT IS HEREBY DECLARED AND AGREED that :-

1. By a Substitute Power of Attorney dated the 13th July 1999 and registered as Jilid XXXVIII Pin 226/99 (hereinafter referred to as "the SPA 1") PHILIP SU was appointed the Attorney by SAIMON BIN AGAS (NRIC No. H0464387) AND RARAIN BIN BAGOL (NRIC No. H0241435) (hereinafter collectively referred to as "the Attorneys") to sell all rights and interest to the lands measuring 4.995 acres more or less and held under Land Applications 79065626-5646 and 5296-5602 situated at KG. Togos, Distrik Ranau, Sabah (hereinafter collectively referred to as "the said Lands" which term shall include the lands alienated under the individual issued and registered titles issued pursuant to such Land Applications)

2. By the Revocation of a Substitute Power of Attorney dated the 3rd March 2000, the Attorneys revoked the SPA 1 (hereinafter referred to as "the Revocation").

3. By the Sale and Purchase Agreement dated 25th August 2000 and the Substitute Power of Attorney dated 25th August 2000 made between the Attorneys of the one part and HAJI LASSIM of the other part (hereinafter referred to as "the Sale Agreement" and "the SPA 2" respectively), HAJI LASSIM is the Purchaser of and their appointed Attorney over the said Lands.

4. PHILIP SU now represents, warrant to and agree with ALOYSIUS TAN and HAJI LASSIM that he shall and is able and willing at his own costs and expense to complete the approved survey for the said Lands and to deliver all three hundred and twenty-seven (327) issued and registered individual titles to the said Lands (hereinafter collectively referred to as "the Said Titles") to ALOYSIUS TAN and HAJI LASSIM on or before the 31st December 2000 (hereinafter referred to as "the Delivery Date") for a total consideration of Ringgit Malaysia Three Hundred and Ninety-Five Thousand Two Hundred and Fifty (RM395,250.00) [made up of

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RM150,000.00 for the approved survey and RM245,250.00 @ RM50.00 per acre for the Said Titles).

5. In consideration of ALOYSIUS TAN & HAJI LASSIM'S acceptance of his aforesaid offer PHILIP SU hereby confirm ratify and acknowledge to ALOYSIUS TAN & HAJI LASSIM that the Revocation is valid and binding upon him and he hereby withdraws all claims allegations whatsoever to the said Lands notwithstanding his earlier objections to the Revocation and claims to the said Lands and he further agree that henceforth he shall not make any further claims to the said Lands and/or the Revocation for any reasons and on any grounds whatsoever, in particular notwithstanding in the event for any reason whatsoever PHILIP SU is unable to deliver the Said Titles by the 31st December 2000 to ALOYSIUS TAN & HAJI LASSIM.

6. ALOYSIUS TAN & HAJI LASSIM hereby agree with PHILIP SU that SUBJECT TO their receipt of the Said Titles on the Delivery Date they are agree to pay the said consideration of RM395,250.00 to PHILIP SU in the following manner:-

(a) Upon all parties' execution of this Deed and the letter of appointment to Messrs LIND WILLIE WONG AND CHIN, Advocates & Solicitors, Level 7, Wisma Great Eastern Life, 65 Jalan Gaya, Kota Kinabalu as the Stakeholder (hereinafter referred to as "the Stakeholder Letter") ALOYSIUS TAN & HAJI LASSIM shall deposit with the Stakeholder the sum of Ringgit Malaysia Two Hundred Thousand (RM200,000.00) only to be deal with in accordance with the terms and conditions of therein set out (a copy of Stakeholder Letter is attached herewith).

(b) The first RM50,000.00 is to be paid:-

(i) upon the Stakeholder's receipt of the original letter of approval to survey dated the 29th September 2000 [ref. DSWC(N): 7.06.1/Vol.II/()] issued by the Lands and Surveys Department to the PHILIP SU for the said Lands; AND

(ii) upon Philip Su's execution of this DEED and the Stakeholder's Letter attached herewith.

(b) The 2nd payment and the 3rd payment in the sum of RM100,000.00 and RM245,250.00 respectively are to be paid upon the Stakeholder's receipt of the Said Titles on the Delivery Date PROVIDED ALWAYS that if the total land area alienated for the Said Lands is more or less than 4,905 acres the 3rd payment shall be adjusted and shall be reduced or increased in proportion to the actual total land area alienated.

6. It is hereby agreed that in the event the Said Titles are not delivered to the Stakeholder by the Delivery Date, the agreement herein to pay the said consideration of RM395,250.00 shall automatically and mutually lapse on the expiry of the Delivery Date and shall thenceforth be of no effect and Philip Su shall refund the 1st payment of RM50,000.00 to ALOYSIUS TAN & HAJI LASSIM forthwith.

[signing page follows]

[5] It has been submitted before us by learned counsel for the defendant that the proper interpretation of cll 5 and 6 of the October deed when taken together absolved his client of any responsibility after 31 December 2000. We will return to the merits of this argument in a moment after the recital of the facts has been completed. You will see at once from the October deed that the defendant was to deliver the titles to the 327 lots to the solicitor as stakeholder by 31 December 2000. That did not happen. But the defendant was paid the RM50,000 to which the deed refers. Nothing happened between 2000 and early 2004 but it is of moment that in August 2003 the plaintiff discovered that the titles of the subject properties has been collected by the defendant using a power of attorney purportedly given by the defendant to one Sakaran a clerk to the defendant's solicitors. Not unnaturally, the plaintiff was alarmed by this state of affairs. So, he issued a writ and moved the court for an injunction which he obtained. It is significant that the injunction dated 20 July 2004 was made in the presence of defendant's counsel. It was a prohibitory injunction. It restrained the defendant from doing a number of things including:

(i) accepting, authorising, perfecting and signing any agreement, options, deeds, documents for the sale of the lands comprised under Land Applications Nos 79065626 to 79065646 (inclusive) and 79065296 to 79065602 (inclusive) measuring an area 4,905 acres more or less situate at Kampung Togop Darat, Ranau, Sabah (hereinafter referred to as the said lands) or any part thereof to any party;

(ii) delivering and authorising the delivery of the draft titles and/or the issued copy of the title deeds to the said lands to any third party; and

(iii) interfering with the plaintiff enjoyment of the said lands or any part thereof.

We may add that the injunction also restrained the defendant from dealing with the subject properties.

[6] It transpires from the evidence that before the commencement of this action against the defendant the land office had placed an obstacle in the defendant's way by declining to issue the titles in cases where a power of attorney was under challenge. The defendant overcame this by issuing a writ in which he named PW2 and PW3 as defendants. At the foot of the writ he claims, amongst others a declaration that the power of attorney given by PW2 and PW3 to the plaintiff was invalid. He also moved for a declaration that the power of attorney dated 13 July 1999 was valid. Service of this writ was allegedly effected by the defendant's solicitors by post. However PW2 and PW3 refuted this. According to them (and here we must say that their

allegation was made quite early in the day through their solicitors) they never received the writ. All they got in the post were some useless pieces of paper — copies of a power of attorney purportedly executed by them.

[7] It is also in evidence that on 10 March 2000, PW2 and PW3 purportedly made a deed whereby they rescinded the earlier revocation of the defendant's substituted power of attorney. According to the defendant, PW2 and PW3 executed this deed in the presence of an advocate, Cecilia Hwang. However PW2 and PW3 denied that they ever executed this document and Cecilia Hwang (DW9) under cross-examination by plaintiff's counsel at the court below denied that the signature was hers. To conclude the facts, we need only state that the defendant in purported exercise of his alleged right under the substituted power of attorney given him in July 1999 allegedly sold and transferred all the subject properties to one Madam Thien Kon Thai ('Mdm Thien'), who according to the defendant was a bona fide purchaser for value. For completeness we may add that yesterday we dismissed an application by Mdm Thien to intervene in this appeal.

[8] Earlier in this judgment we referred to the main thrust of the defendant's appeal before us today. We will remind ourselves of what the defendant's case is before us. It is this. Clause 6 of the October deed between the defendant of the one part and Aloysius Tan and the plaintiff of the other part, the defendant was to deliver the titles to the subject properties to the solicitor stakeholder. He was to do this by 31 December 2000. If he did not do it the whole deed would fall to the ground. It would become null and void. Thereafter, he was free to do as he chose with the subject properties. An additional argument was put to us. According to the defendant the plaintiff had no right, title or interest at law or in equity to the subject properties at the time the October deed was executed. This is because the plaintiff had entered into the agreement with PW2 and PW3 in 25 August 2000 that is to say at a time where the power of attorney in his favour was still extant. Since PW2 and PW3 had nothing to convey the plaintiff could receive nothing; *nemo dat quod non habet*. Accordingly, the October deed contained the mistaken assumption that the plaintiff did have rights over the subject properties.

[9] We must express our dissent to the defendant's argument. If you look at cll 5 and 6 together you will find this is what they actually say. Firstly they make amply clear that the defendant accepts as 'valid and binding upon him and he hereby withdraws all claims allegations whatsoever to the said Lands notwithstanding his earlier objections to the revocation and claims to the said lands'. Secondly, that this acknowledgment by the defendant is to bind him 'notwithstanding for any reason whatsoever' the defendant 'is unable to deliver the said titles by 31 December 2000'. Thirdly, if the defendant does

not deliver the titles by 31 December 2000 then the 'agreement shall automatically and mutually lapse on the expiry of the delivery date'.

[10] It follows from the forgoing analysis that the October deed did not lapse and become null and void for all purposes when the defendant failed to deliver the titles to the solicitor stakeholder by 31 December 2000. This is the conclusion which the learned trial judge arrived at and we are in agreement with him that this is the correct construction of the October deed. There is an additional ground on which the defendant's argument on this part must fail. If we were to accede to the defendant's contention it would mean that he would be able to escape from his obligations under the October deed through his own default. It is a settled principle of general application that a person should not be permitted to take advantage of his own wrong. When applied in the sphere of contract law it expresses itself in the proposition that a guilty party ought not to be permitted to take advantage of his own breach of the contract. In *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 Wan Hamzah SCJ when delivering the judgment of the Supreme Court said this:

> The rule is that if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act or omission bring about, then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract, vide the judgment of Lord Atkinson in *New Zealand Shipping Company Ltd v SDAECD France* [1919] AC 1.

[11] In our judgment the principle enunciated by Wan Hamzah SCJ applies with full force to the facts of this case. Here it is the defendant who by his own omission sought to bring an end to the October deed with the plaintiff being blameless. To permit him to do that would be to enable him to take advantage of his own wrong.

[12] As for the defendant's argument that he was free to deal with the subject properties because of the mistaken assumption contained in the October deed, we find this to be completely devoid of any merits. As we have earlier stated, the defendant acknowledged in the October deed that he had no longer any rights under the power of attorney given to him in 1999 by PW2 and PW3. He also acknowledged that he would not challenge the revocation of this power in any circumstances. The promise made by him survived despite his failure to deliver the titles by 31 December 2000. Having acknowledged thus it does not lie in his mouth to now challenge the plaintiff's rights. Learned counsel for the defendant however counters with the submission that nowhere in the October deed was there an acceptance or

A acknowledgement by the defendant of the plaintiff's rights, if any, under the sale and purchase agreement dated 25 August 2000. With respect we cannot agree. The acceptance by the defendant that he would not challenge the revocation of the power of attorney in his favour has the effect of putting beyond challenge in so far as he is concerned the plaintiff's rights, title and
B interest under the agreement dated 25 August 2000. In our judgment the defendant's conduct in this case raises an estoppel against him in respect of the plaintiff's rights over the subject properties. In order to attack the plaintiff's rights the defendant must be able to show that the revocation of the power of attorney given him is bad. He cannot do that. Because he had
C assured or represented — call it what you will — to the plaintiff that he will not challenge the aforesaid revocation.

[13] In respect of the learned judge's finding against his client, learned
D counsel for the defendant has submitted that these findings are impeachable because they are a product of a misdirection of the facts. Learned counsel has painstakingly taken us through the evidence on material points. But we must confess that there are two very serious obstacles that lie in the defendant's path in this part of the case. First, as has been demonstrated by learned
E counsel for the plaintiff, the memorandum of appeal is woefully inadequate in that it does not contain any attack on the learned judge's findings of facts. Indeed most of the grounds are directed against the learned judge's orders made against Mdm Thien. The crux of the defendant's complaint appears to be that the learned judge's order cannot stand because he made orders against
F a party not before him. Nevertheless, giving the memorandum of appeal the most generous interpretation brings us to the second obstacle. It is this. The findings of the learned judge on all material points before him are entirely fact sensitive. His findings include, a finding that the plaintiff and his witness were credible and that the defendant was untruthful and could not be
G believed. It included findings on the defendant's state of mind in relation to the serious charge of fraud made against him. The learned trial judge after a very thorough and careful analysis of the facts came to the conclusion that the defendant had acted fraudulently in all circumstances of the case.

H **[14]** Now what is the function of this court in a case like this, where the trial judge has the audio visual advantage which we clearly lack? The answer is to be found in the speech of Lord Shaw in *Clarke v Edinburgh Tramways Co* [1919] SC (HL):

I > When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having

seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[15] We have very carefully scrutinised the judgment under appeal, conscious that the judge's decision has resulted in the defendant being convicted of fraud. But we find that the learned judge had judicially appreciated and evaluated the evidence before him and was amply warranted in arriving in the decision as he did. There is no doubt that there is cogent evidence on record to support his findings. In our considered view a reasonable tribunal faced with the evidence and facts that were presented at trial in this case would have come to the conclusion that the charges against the defendant had been proven beyond a reasonable doubt. It follows that this is a case that does not warrant appellate interference.

[16] For the reasons already given, this appeal cannot succeed. It is dismissed. The appellant must pay the costs of the appeal to the respondent. In the circumstances of this case we direct that a certificate for two counsel be issued. The orders of the High Court are affirmed. The deposit in court shall be paid out to the respondent to account of his taxed costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon